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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. EMILY ROSE ADAPTAR RIOS, Appellant.	2 CA-CR 2009-0319 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084356

Honorable Richard S. Fields, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Emily Rios was convicted of two counts of aggravated assault, one involving the use of a deadly weapon and the other involving serious physical injury, both domestic violence and dangerous-nature offenses. The trial court sentenced her to enhanced, mitigated, and concurrent prison terms of five years on each count. On appeal, Rios contends the court erred by failing sua sponte to instruct the jury on justification of the use of force to prevent a crime under A.R.S. § 13-411. She also argues the court abused its discretion by not granting her motion for a new trial on the same ground.[1] For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the verdict[s]." *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In October 2008, Rios was living in an apartment with her boyfriend, Robert N., and friend, Mandy T. On the morning of October 12, Rios and Robert got into an argument. The argument escalated, and when Robert insulted Mandy, who was present, Rios became angry and started punching Robert in the chest. After pushing Rios aside, Robert grabbed Mandy by the hair and threw her to the ground, saying, "This is all your fault." Rios pushed Mandy into the bathroom, telling her to lock the door.

¶3 Rios then grabbed a knife from the kitchen and told Robert to calm down. Robert walked toward Rios, asking her, "What are you going to do with that?" Rios swung the knife at Robert, stabbing him once in the chest, piercing his heart and lung.

[1]In her opening brief, Rios appears to make three separate arguments. However, because her first two arguments essentially challenge the trial court's denial of her motion for a new trial, we treat them as one argument.

Robert chased Rios outside and locked her out of the apartment. Rios began pounding on the door and threatened to "mess up" Robert's car. As Robert ran outside toward his car, he began to have trouble breathing and noticed blood "squirt[ing]" from under his shirt. Rios then called 9-1-1 and waited with Robert for paramedics and police to arrive. Rios was indicted on two counts of aggravated assault and was found guilty of both counts. She was sentenced as described above. This appeal followed.

Discussion

I. Jury Instructions

¶4 On appeal, Rios contends the trial court committed reversible error by failing sua sponte to instruct the jury on justification of the use of force to prevent a crime pursuant to A.R.S. § 13-411. That statute provides: "A person is justified in . . . using . . . deadly physical force against another if and to the extent the person reasonably believes that . . . deadly physical force is immediately necessary to prevent the other's commission of . . . aggravated assault." § 13-411(A).

¶5 Because Rios did not request the instruction below, we review this claim for fundamental, prejudicial error. *See State v. Pandeli*, 215 Ariz. 514, ¶ 7, 161 P.3d 557, 564 (2007). A trial court's failure to instruct on vital matters may amount to fundamental, prejudicial error "'even if not requested by the defense.'" *State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003), *quoting State v. Avila*, 147 Ariz. 330, 337, 710 P.2d 440, 447 (1985). But, "[i]t is a rare case where the omission of an instruction without objection constitutes fundamental error." *State v. Marchesano*, 162 Ariz. 308, 316, 783 P.2d 247, 255 (App. 1989), *disapproved of on other grounds by State*

v. Phillips, 202 Ariz. 427, 46 P.3d 1048 (2002). And, although "'a defendant is entitled to a justification instruction if it is supported by "the slightest evidence,"'" *State v. Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d 690, 692 (App. 2005), *quoting State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997), one should not be given unless "'reasonably and clearly supported by the evidence,'" *id.*, *quoting State v. Walters*, 155 Ariz. 548, 553, 748 P.2d 777, 782 (App. 1987).

¶6 At trial, Rios testified that she was "terrified when [Robert] threw [Mandy] on the ground." She wanted to lure Robert out of the house, by threatening to damage his car, because she thought he might hurt Mandy. She argues, therefore, that the trial court should have given the crime-prevention instruction because Rios was attempting to prevent Robert from committing an aggravated assault against her or Mandy by stabbing him.

¶7 Even assuming this evidence warranted giving a crime-prevention instruction, the trial court did not commit fundamental error by failing to do so. The court properly instructed the jury on self-defense and defense of third persons to substantially the same effect. *See* A.R.S. §§ 13-404 through 13-406. And, a defendant is not "entitled to [a particular] instruction when it is adequately covered by other instructions." *State v. Martinez*, 196 Ariz. 451, ¶ 36, 999 P.2d 795, 804 (2000). The court instructed the jury that Rios would be justified in using physical force if "a reasonable person in [her] situation would have believed that physical force was immediately necessary to protect against another's use[, attempted use, or threatened use] of unlawful physical force" and that she would be justified in using deadly physical force

"only to protect against another's use[, attempted use, or threatened use] of deadly physical force."

¶8 Similarly, under § 13-411(A), the crime-prevention statute, the jury would have been instructed that deadly force would be justified "if and to the extent the person reasonably believes that . . . deadly physical force is immediately necessary to prevent the other's commission of . . . aggravated assault." But because the aggravated assault that Rios would have been justified in preventing under § 13-411(A) was the same conduct the jury was instructed she had been justified in defending against, the instruction was adequately covered by the self-defense and defense-of-third-person instructions.

¶9 Rios nevertheless contends these instructions were insufficient, because § 13-411 has "significantly different elements" than the self-defense and defense-of-third-person statutes. Quoting *State v. Korzep*, 165 Ariz. 490, 492, 799 P.2d 831, 833 (1990), she argues the protection offered by § 13-411 is broader than either of these statutes, because § 13-411 does not require "an immediate threat to personal safety before deadly force may be used" and "provides a presumption of reasonableness not available under the other justification sections." *See* § 13-411(C) ("A person is presumed to be acting reasonably . . . if the person is acting to prevent the commission of any of the offenses listed in subsection A of this section."). Even assuming § 13-411 is broader in scope, we disagree that the trial court was required to give the instruction under the circumstances.

¶10 The crime-prevention, self-defense, and defense-of-others statutes all require a reasonable belief that the use of deadly force is "immediately necessary" either

to prevent an enumerated offense under § 13-411, or to protect against the use, attempted use, or threatened use of deadly physical force under the self-defense and defense-of-others statutes. And although unlike the self-defense and defense-of-third-person statutes, § 13-411 gives rise to a presumption that the person's use of force is reasonable, this is a rebuttable presumption that disappears when the state presents "contradictory evidence." *See State v. Martinez*, 202 Ariz. 507, ¶¶ 18-19, 47 P.3d 1145, 1148-49 (App. 2002).

¶11 Here, the state presented evidence that Rios had stabbed Robert in anger because he had used racial slurs against Mandy, that Rios had told detectives several times she knew she had no right to stab him, and that Robert did not present an immediate threat to Rios or Mandy, who had locked herself in the bathroom, when Rios had stabbed him. In addition to the state's evidence, Rios testified that she had been "mad" and had lost control before stabbing Robert. In sum, there was ample evidence that Rios's use of deadly force was not immediately necessary to prevent a crime or protect against a deadly assault. Thus, any presumption that Rios had acted reasonably in stabbing Robert was rebutted by ample contradictory evidence. And although Rios argues the decision whether the presumption applies was a question for the jury, she neither develops the argument, nor offers legal authority to support it.[2] We therefore do

[2]To the extent Rios is arguing the elements in § 13-411(A) apply to the presumption in subsection (C), she is mistaken; the opposite is true. "[A] *presumption* does not create elements of a defense or offense, but rather *applies* to an element of a defense or an offense." *State v. Martinez*, 202 Ariz. 507, ¶ 11, 47 P.3d 1145, 1147 (App. 2002).

not consider it further. *See* Ariz. R. Crim. P. 13(a)(6) (brief must contain argument with citation to authorities, statutes, and parts of record relied on); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claim waived on appeal by insufficient argument). The trial court did not commit error, let alone fundamental, prejudicial error, by failing sua sponte to instruct the jury on the crime-prevention statute. *See State v. Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d 601, 608 (2005) (defendant first must prove error to obtain relief under fundamental error review).

¶12 Rios also argues the trial court abused its discretion in failing to grant her motion for a new trial, filed pursuant to Rule 24.1, Ariz. R. Crim. P. Because her Rule 24 motion was made on the same ground, and because we have concluded the court did not commit reversible error by failing to give an instruction under § 13-411, we also conclude the court did not err by denying the motion for a new trial.[3]

Disposition

¶13 For the reasons stated, we affirm the convictions and the sentences imposed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

[3]Relying on *State v. Garfield*, 208 Ariz. 275, 92 P.3d 905 (App. 2004), Rios argues that because "reasonable response is the standard for [§ 13-411,] a reasonable jury would likely have found [her] actions reasonable even if not specifically justified as self-defense or defense of a third person." However, in *Garfield*, the trial court had refused to give a § 13-411 instruction because it found the statute did not apply to guests, and this court reversed and remanded, concluding the legislative purpose would be promoted by allowing guests the same protections as residents in preventing crimes in the home. *Id.* ¶¶ 10, 14. And in any event, *Garfield* is further distinguishable because there, we were reviewing for harmless error, and evidence had been presented at trial that the victim had produced a gun before being shot by the defendant. *Id.* ¶¶ 8, 10, 12, 15.

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge